UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IN RE APPLICATION OF
ANA LUCIA GARCIA PEDRIALI NOBREGA

15 MISC 323 (LTS)

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MEMORANDUM ORDER

Before the Court is the ex parte Application of Ana Lúcia Garcia Pedriali Nobrega ("Applicant"), seeking judicial assistance to obtain evidence located in the Southern District of New York for use in foreign proceedings, pursuant to 28 U.S.C. § 1782. The Court has considered the Application and accompanying documents carefully. For the following reasons, the Application is denied.

BACKGROUND

The following facts are drawn from the Application and are taken as true for the purposes of this decision.

The Applicant seeks evidence to be used in a pending probate proceeding as to the estate of her mother, Ida Garcia Pedriali ("Ida") and in the "ongoing investigation" and "potential reopening" of the probate proceeding as to the estate of her father, Otávio Antonio Pedriali ("Otávio"). A probate proceeding, filed by three of the Applicant's siblings, with respect to the estate of Ida, is pending in a Brazilian family court. (Application at 1.) The estate of Otávio, was subject to another probate proceeding in Brazil, and is no longer pending. (Id.) According to the Applicant, under Brazilian probate law, she is heir to both of her parents and thus is entitled, along with her siblings, to a percentage distribution of all assets within the estates. (See id. at 2-3.)

The Applicant asserts that, although Ida and Otávio each left a will, neither will disclosed any cash or securities held by them outside of Brazil. (Id.) However, the Applicant believes, based on "a lead" she received in July 2008, that Otávio maintained brokerage account(s) with Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") in the United States. (Id. at 2-3.) Upon learning this information, the Applicant sent a letter to Merrill Lynch Brazil, requesting that any accounts held in Otávio's name individually or jointly with Ida or any of his heirs be frozen, and further requesting the production of account documents. (Id. at 3.) Merrill Lynch Brazil apparently advised the Applicant to issue the same request to Merrill Lynch's Litigation Department located in Miami, Florida. (Id. at 4.) The Applicant subsequently filed and was granted a 28 U.S.C. § 1782 Application for a subpoena duces tecum directed to Merrill Lynch by the U.S. District Court for the Southern District of Florida. (Id.; Ex. 8.) Although the instant Application does not include documentation of any response by Merrill Lynch to the subpoena, the Applicant states that Merrill Lynch "was unable to respond to the subpoena . . . because it appears that the accounts in question where [sic] held by a Swiss division that has now been acquired by another Swiss bank." (Application at 4.)

Thus, in order to "confirm the existence of offshore bank/brokerage accounts" and potential disbursements therefrom, Applicant now seeks discovery from five intermediaries that may have records of wire transfers out of accounts maintained by her siblings, her mother or her father "if any of those wire transfers were processed either by [sic] through the CHIPS wire transfer system managed by TCH or through Fed Wire (relying on either Citibank, Chase, Bank of America or Wells Fargo as intermediary banks)." (Id.) The Applicant represents that the intermediaries reside or can be found in this District. (Application at 1.)

DISCUSSION

28 U.S.C. § 1782 permits United States district courts to authorize discovery in aid of foreign proceedings. The statute imposes three separate requirements: (1) that "the person from whom discovery is sought resides" in this district; (2) that "the discovery is for use in a foreign proceeding before a foreign tribunal"; and (3) that the application is made by an "interested person" or a foreign tribunal. See Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 80 (2d Cir. 2012).

Although the Applicant has proffered that the discovery targets reside within this district, the Applicant has not satisfied the second and third prongs. With respect to the requirement that the discovery be "for use in a foreign proceeding," the Supreme Court has held that such a proceeding, if not yet commenced, must be within "reasonable contemplation." See Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 259 (2004). The Second Circuit has explained that this standard means that "the applicant must have more than a subjective intent to undertake some legal action, and instead must provide some objective indicium that the action is being contemplated." Certain Funds, Accounts and/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113, 123 (2d Cir. 2015). The applicant "must present to the district court some concrete basis from which it can determine that the contemplated proceeding is more than just a twinkle in counsel's eye." Id. at 124 (emphasis added).

Here, the Applicant has not presented a concrete basis from which the Court can determine that the discovery being sought will be "for use in a foreign proceeding." The Applicant, admittedly, is not a party to the pending probate proceeding with respect to Ida's estate. The fact that she could potentially move to reopen Otávio's probate proceeding is insufficient to supply the "objective indicium" that a foreign proceeding in which the discovery would be used is within reasonable contemplation. See KPMG, 798 F.3d at 123. For the same reasons, the Applicant is not an "interested party" within the meaning of the statute either. The mere fact that the Applicant may stand to receive a financial benefit from the pending probate of Ida's estate is insufficient, without more, to render the Applicant an "interested party" eligible to obtain discovery through section 1782 for use in the pending probate proceeding. See id. at 119. Esses v. Hanania, 101 F.3d 873, 875-76 (2d Cir. 1996), upon which the Applicant relies, is not to the contrary. There, a potential beneficiary sought and obtained section 1782 discovery in connection with litigation, to which he was a party, over the appointment of an administrator of the estate. See id. at 875-76. The interest of the applicant in that case thus was "greater than simply that of a beneficiary." Id. at 876; see also KPMG, 789 F.3d at 119 n.6 (noting Esses beneficiary "was also a party to the foreign proceedings") (emphasis in original). The Applicant here, who has shown only that she is a beneficiary of her parents' estates, has failed to demonstrate that she is an "interested party."

CONCLUSION

For the foregoing reasons, the Application is denied. The Clerk of Court is requested to close this miscellaneous matter.

SO ORDERED.

Dated: New York, New York
October 7, 2015

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge